UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 4, **and** **AT&T SERVICES, INC.**	**Case 13-CA-185708**

ANSWERING BRIEF FOR COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 4

Communications Workers of America, District 4 (hereinafter "CWA" or "Union") hereby submits its Answering Brief in the above-captioned case pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations.

Respectfully submitted,

s/ *Matthew R. Harris*

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ANSWERING BRIEF FOR COMMUNICATIONS WORKERS OF AMERICA, DISTRICT 4

I. BACKGROUND

Respondent submitted its Initial Brief on September 26, 2017, the last date for filing. Board Rules and Regulations Section 102.35(a)(9), provides in pertinent part, "In proceedings before the Board, answering briefs may be filed within 14 days, or such further period as the Board may allow, from the last date on which an initial brief may be filed." Accordingly, the Union now submits its Answering Brief in response to Respondent's Initial Brief.

II. AUTHORITY AND ARGUMENT

A. Respondent Completely Ignores the Interests of the Employees at Issue and Instead Seeks to Imbue Testing Materials With Protections Not Afforded Under the Act.

In its Initial Brief, Respondent completely ignores the interests of the employees at issue and instead turns its focus to protecting testing materials in their capacity as testing materials. Never is this more apparent than when Respondent argues for the need to "adequately protect the *information's* security." (emphasis added) (Resp. Initial Brief, p. 17) Moreover, Respondent repeatedly emphasizes the risks disclosure poses to the "integrity of [the test]." (*Id.* pp. 18, 19, 20).

In attempting to further its position in this respect, Respondent seeks to re-write *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), stating that the Supreme Court's holding in that case "turned first on the employer's undisputed and important interests in test secrecy . . ." and that "*Detroit Edison* stands for the proposition that an employer's interest in protecting the integrity of an employee test is legitimate and may form the basis of withholding from a union

information that would undermine that interest." (*Id*. p. 19) However, the Court specifically foreclosed this argument:

> The Company has presented a lengthy argument designed to demonstrate that the Board and Court of Appeals misunderstood the premises of its aptitude testing program and thus erred in concluding that the information requested by the Union would be of any actual or potential relevance to the performance of its duties. The basic challenge, insofar as it concerns the test battery and answer sheets, is foreclosed, however, by §10(e) of the Act because of the Company's failure to raise it before the Board.

Detroit Edison, supra, 440 U.S. at 312. Moreover, a few sentences later Respondent undercuts its own argument by correctly citing the holding in *Detroit Edison*: "Thus, the issue of named employees' test scores ***was decided solely on the basis of whether employees' confidentiality interests outweighed the union's need for the requested information***." (emphasis added) (*Id*. p. 20) Thus, Respondent concedes *Detroit Edison* turned on employee confidentiality interests, not an employer's purported financial investments in producing and administering a test.

In essence, Respondent seeks to extend the protections of the Act to testing materials *qua* testing materials, rather than connecting the materials to an actual, substantial and legitimate interest (e.g. employee confidentiality). First, the Union must stress that it has not sought and does not seek the test questions or answers. Second, Respondent acknowledges that employees are provided no assurances that testing results or testing data will be kept confidential. (Jnt. Stip. of Facts p. 4, ¶23) Hence, Respondent is left only with the argument that the information at issue is abstractly protected because it cost a "substantial" sum to produce, and therefore, Respondent concludes, testing results and test-taker identities should remain confidential. This is insufficient to justify withholding relevant information.

Respondent also argues that producing the information will increase the likelihood that the test questions and answers will be reproduced. However, Respondent has provided absolutely

no indication as to how providing the test takers' identifying information and test results would result in the obsolescence or destruction of the underlying tests. Providing the information requested could produce no more risk of harm than the Employer's unilateral decision to allow test takers to take the test unproctored, online, at a location of their own choosing.

In sum, Respondent's "confidentiality concerns" have absolutely nothing to do with individual employee confidentiality, but instead purportedly relate to the cost of producing the test and the secrecy of the test questions and answers. The Union has not and does not seek the test questions and answers, and providing the underlying information to the Union poses no more risk than the Respondent's haphazard administration of the tests. Respondent's alleged concerns are neither legitimate nor substantial under the Act.

B. <u>Respondent's Assertion that a Previous Test Was Compromised is Premised Upon Tenuous Information and Hearsay Thrice Removed.</u>

Respondent claims that its interest in protecting the names, work location, current title, Net Credit Service (NCS), test date, and test results for all employees taking the TMT II test for the periods of 1/1/2014 through implementation of the TMT III (TMTF II Results), and the TMT III test 10/1/2015 through the present is heightened because a previous test was supposedly compromised, not by the Charging Party but by a local affiliate of the Charging Party. (*Id.* p. 6) Respondent claims an HR representative was told by a labor relations representative, who was told by an employee, that he (the employee) received a document that attempted to replicate a previous version of the test at issue "from the union." (*Id.*) This is hearsay upon hearsay upon hearsay and should not be afforded any weight by the Board.

Further, Respondent acknowledges that "someone . . . had recreated the test using pieces and parts gleaned . . . from test-takers' memories." (*Id.*) Respondent goes on to argue that it

implemented the new test as a result of its conclusion that the original test had been compromised. However, there is nothing indicating that the new TMT III/TMTF III tests are protected from similarly being re-created from test-takers' memories. As noted, the likelihood of the test being recreated is even greater as a result of Respondent's own decision to have employees take the test in an unproctored environment, online, at a location of their own choosing. (Jnt. Stip. of Facts p. 4, ¶18) Hence, Respondent's purported justification is grounded upon tenuous information and is a thin veil for arbitrarily withholding the information at issue.

C. The Employer Now Attempts to Pass Blame Upon the Union for Respondent's Unilateral Refusal to Bargain in Good-Faith and Refusal to Provide Relevant Information.

In its Initial Brief, Respondent asserts that the Union "did not negotiate over the Employer's stated confidentiality concerns but, instead, disputed the Employer's claimed confidentiality interest." (Resp. Initial Brief, p. 1) A short review of the facts undercuts this assertion.

On April 8, 2016, Ron Honse, CWA Staff Representative, requested information from Steve Hansen, AT&T Midwest Director of Labor Relations, including the names, titles, and work locations of all employees that took the TMTIII test in the first quarter of 2016. (*Id*. Ex. 18) The Parties (Honse and Hansen) exchanged several emails regarding the information at issue, and met in-person on a few occasions. After it was revealed by Hansen that pass/fail rates provided by the Respondent were erroneous, the Union further refined its request. Respondent at all times refused to provide the information sought.

Finally, on or about July 28, 2016, during an in-person meeting, Honse believed Hansen offered to provide the Union with all test-takers' identifying information and testing results for two test dates. (Jnt. Stip. of Facts p. 7, ¶¶46-48) Honse indicated he was willing to accept such an

offer. (*Id*.) On or about August 31, 2016, Hansen either clarified or retracted the offer, and instead offered the Union the opportunity to verify the results for only two test takers. (*Id*.) This would not have allowed the Union to verify the pass/fail percentages provided by the Respondent, and similarly would not have allayed the Union's concerns after Respondent demonstrated that it previously provided errant data. After months of communications and meetings between Honse and Hansen, the Union, still without the information, elected to avail itself and the bargaining unit employees of the protections of the Act.

The Respondent has pointed to no evidence supporting its claim that the Union somehow failed to negotiate in good-faith. Rather, Respondent merely seeks to deflect attention from its unlawful refusal to provide information to the Union.

III. CONCLUSION

Respondent has violated 8(a)(5) by failing and refusing to provide the Union with pertinent and relevant information. The Board should compel Respondent to produce the information as requested by the Union.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to the Board's Rules and Regulations §§ 102.5(f) and (h), the undersigned hereby certifies that the Union's Answering Brief was filed electronically with the Office of the Executive Secretary on October 9, 2017. A copy was also submitted to the following individuals via regular U.S. mail and email the same day.

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